SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 41

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,

Appellants,

vs.

BRENT STEIN,

Appellee.

On Appeal From the District Court for the Northern District of Texas.

Mel S. Friedman, Esq. and Stanley Fleishman, Esq. as Amici Curiae in Support of Appellee.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 565

CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County,
Appellants,

vs.

BRENT STEIN,
Appellee.

On Appeal From the District Court for the Northern District of Texas.

Mel S. Friedman, Esq. and Stanley Fleishman, Esq. as Amici Curiae in Support of Appellee.

Mel S. Friedman is a member of the bar of the State of Texas. In the court below, he appeared as *amicus curiae* on behalf of appellee and argued the substantial constitutional questions which are presented on the appeal herein. See, *Stein v. Batchelor,* 300 F. Supp. 602, 603. He has also been involved in litigation in both federal and state courts involving the same issues.

In accordance with the Rules of the Court, consent to the filing of a brief *amicus curiae* has been obtained

from all parties to the case and is being filed simultaneously with the brief herein with the Clerk of this Court.

Mr. Friedman has associated with him on this brief Stanley Fleishman, a member of the bar of this Court and of the bar of the State of California. Mr. Fleishman has argued a number of cases in the obscenity area before this Court. See, *Alberts v. California*, 354 U.S. 476; *Smith v. California*, 361 U.S. 147; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Redrup v. New York*, 380 U.S. 767. He is presently involved in litigation, both criminal and civil, in federal and state courts in California and other states, where the same constitutional questions presented on this appeal are also directly raised.

Amici desire to bring to the attention of the Court considerations of transcending importance to the case. The development of constitutional standards for judging obscenity require, in the first instance, a brief historical survey in order to properly appraise the correctness of the decision below. Amici believe this is necessary, in the light of the complexity of the problem involved in defining obscenity, and in applying the definition in particular cases.[1] In addition, amici also believe

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[1] "The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication . . . the upshot of all this divergence of viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." Justice Harlan in *Ginsberg v. New York, Interstate Cir-*

that it will be helpful to the Court to bring to its attention the growing legal trends toward the abolition of criminal sanctions against private sexual conduct, in the light of changing social and cultural standards. Finally, the importance of the experience of other countries which have abolished all legal prohibitions against the publication, sale and distribution of obscene material to adults deserve consideration on the appeal herein. Amici have attached to this brief as Appendix A a report by the Danish Ministry of Justice on the recent changes in the Danish Criminal Code with respect to the dissemination to adults of allegedly obscene written and pictorial material.

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cuit, Inc. v. City of Dallas, United Artists Corp. v. City of Dallas, 390 U.S. 629, 676, 704-707, concurring and dissenting opinion. See also, Justice Black in *Ginzburg v. United States*, 383 U.S. 463, 478-481; Justice Douglas in *Ginzburg v. United States*, 383 U.S. at 483; Justice Harlan in *Memoirs v. Massachusetts*, 383 U.S. 413, 455-456; Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197; Chief Justice Warren in *Jacobellis v. Ohio*, 378 U.S. at 200-201; *Per curiam* in *Redrup v. New York*, 386 U.S. 767, 770-771. The law of obscenity has been described as "a constitutional disaster area". Magrath, "The Obscenity Cases: Grapes of Roth", in Supreme Court Review 7, 56 (1966).

ARGUMENT.

I.

A State Statute Which Purports to Punish the Dissemination of Obscene Material to Adults Violates the Free Speech and Press, Due Process, and Equal Protection Provisions of the First and Fourteenth Amendments to the United States Constitution.

A. *Roth v. United States* [*Alberts v. California*], 354 U.S. 476, held that the protective guarantees of the First Amendment were available to all ideas having even "the slightest redeeming social importance." Nevertheless, obscenity was deemed beyond the pale of constitutional protection, a conclusion bottomed on an historial view that obscenity is so low in the hierarchal scale of expression as to warrant exclusion from the impregnable area of the First Amendment. The prior standard of judging obscenity by the effect of an isolated excerpt upon particularly susceptible persons was rejected, and in place of the *Hicklin* test there was substituted the test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. Since obscenity implicates First Amendment questions, ceaseless vigilance was essential to prevent erosion of free speech and press guarantees by the Congress or by the States; the door barring intrusion was to be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

The vagueness of the standards and criteria for judging obscenity and the difficulty of applying such tests to particular material involved in specific cases

were plainly manifested in the uniform reversals of lower court rulings by this Court following *Roth*.[2] In *Jacobellis v. Ohio*, 378 U.S. 184, and *Memoirs v. Massachusetts*, 383 U.S. 413, the standards for judging obscenity were elaborated to include the three-pronged test: contemporary community standards, prurient interest, and social importance. The three criteria were to be applied independently; the social value of the material was neither to be weighed against nor cancelled by its prurient appeal or patent offensiveness.

The decisions in *Ginzburg v. United States*, 383 U.S. 463, and *Mishkin v. New York*, 383 U.S. 502, were, it is submitted, a recognition by the Court of the complex problem of establishing a definition of obscenity which could be reconciled with the First Amendment. The judicially improvised doctrine of "pandering" was itself inherently vague and, in operation and effect, a further deterrent to freedom of expression. Nevertheless, the invocation of the "variable obscenity" approach and the emphasis on the conduct of the accused, rather than the nature of the material, presaged a changing outlook by the Court, with respect to an appropriate balancing of the individual and societal interest in First Amendment freedoms of speech and press with those narrow interests which the State might appropriately protect.

In *Redrup v. New York*, 386 U.S. 767, the Court concluded that the distribution of the material therein involved was protected by the First and Fourteenth

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[2]See the partial recital of cases contained in the opinion of Justice Harlan, concurring and dissenting, in *Ginsberg v. New York*, 390 U.S. 676, 704-707, fn. 1-11. See also, Katz, "Free Discussion v. Final Decision: Moral and Artistic Controversy and the *Tropic of Cancer* Trials", in 79 *Yale L.J.* 209 (1969).

Amendments from governmental suppression, "whether criminal or civil, *in personam* or *in rem*" (386 U.S. at 770). The difficulty which members of the Court were finding in squaring the standards for judging obscenity with the constitutional requirements of the First Amendment were candidly delineated. In holding that the lower court judgments could not stand under any particular view, the *per curiam* opinion of the Court added the following significant statement:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; cf. Butler v. State of Michigan, 352 U.W. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. Nor none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31." (386 U.S. at 770.)

Redrup, therefore, and the multifold *per curiam* reversals thereafter based on *Redrup*, indicated that adults ordinarily could not be deprived of material dealing with sex unless one of the aforestated countervailing interests were present to justify the State's intervention in the area. Absent a case dealing solely with mi-

nors or with material forced upon the privacy of an individual who is expressly unwilling to receive such material, *Redrup* pointed in the direction of freedom for adults to receive or purchase any material dealing with sex or nudity, in the light of the guarantees of the First Amendment.

There was a basic twofold significance to the decision of the Court in *Stanley v. Georgia,* 394 U.S. 557. It was a recognition, in the first place, that obscenity is within the First Amendment's protection of speech and press; a rejection of the notion that protection of freedom of expression depends upon some arbitrarily imposed scale of values. In the second place, the added dimensions of the right to privacy and liberty of circulation, in the *Stanley* opinion, sharpened the line between protected expression and conduct which the State may restrict. See, Note, "The Supreme Court, 1968 Term", in 83 *Harvard L.R.* 147-154 (1969).

In *Stanley,* the State had argued that since "obscenity" cannot be deemed to be within the area of constitutionally protected speech under *Roth,* it followed that the State was "free to deal with the possession of such material in much the same manner as it dealt with other contraband found in the possession of its citizens." The Court replied that the case could not be decided "simply by citing *Roth*". The mere categorization of material as "obscene" was insufficient justification for "a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments". The State did not have the right to control "the moral content of a person's thought", nor was it relevant that the material involved was devoid of ideological content. The line between the transmission of ideas and

mere entertainment was too elusive for the Court to draw. In the context of private consumption of ideas and information, the possession of obscene material could not be prohibited merely on the theory that it might lead to antisocial conduct. *Roth*, the Court stated, remains viable with respect to public distribution of obscene materials only where the State can establish justification for intervention, as in the case of dissemination to minors or unwarranted intrusion upon the privacy or sensibilities of the public.

The opinion in *Stanley* reflects a return to the operational safeguards for all First Amendment freedoms. The decisions of this Court make clear that when governmental regulation of action within the reach of the First Amendment is challenged, two demonstrations by the State become essential to its validity. The first is a clear showing that the burden placed upon the exercise of freedom of speech is justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate, and the second is a showing that no alternative forms of regulation are available to protect that interest without infringing upon First Amendment rights. See, *Talley v. California*, 362 U.S. 60; *NAACP v. Alabama*, 357 U.S. 449; *Sweezy v. New Hampshire*, 354 U.S. 234. In *Stanley*, the sole countervailing interests which the Court found justifiable were the protection of minors and the protection of those unwilling persons upon whom the material was obtrusively forced.

Stanley emphasizes the right to individuals "to receive information and ideas". The right to possess obscene material for private use was premised on the right to receive information, ideas and entertainment.

Liberty of circulation was brigaded with freedom to possess obscene material. See, *Lovell v. City of Griffin*, 303 U.S. 444, 452. The Court recognized that freedom of speech and press embraces "the right to distribute literature" and "the right to receive it", pointing to *Martin v. City of Struthers*, 319 U.S. 141 and *Griswold v. Connecticut*, 381 U.S. 479.

If one has the constitutional right to possess "obscene" material, and the right to receive such obscene material, it follows, it is submitted, that governmental limitation upon the sale and distribution of such material would also run afoul of the guarantees of the First Amendment. Individuals who have a right to possess and receive obscene material cannot be required to obtain such material illegally. The State should not place citizens in the position of surreptitiously obtaining material which they are lawfully entitled to possess, and such an unfair burden would itself be a limitation upon the free circulation of protected material and inhibit persons from possessing or receiving constitutionally protected material. Such "chilling effect" upon the exercise of freedoms of speech and press is inconsistent with the guarantees of the Constitution.

In *Lamont v. Postmaster General*, 381 U.S. 301, it was stressed that access to publications is a fundamental personal right necessary to make the express guarantees of the First Amendment meaningful. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." (381 U.S. at 308). It would be a barren marketplace of ideas that had only buyers and no sellers. If the right to possess and to receive obscene material for private use is protected by the First Amend-

ment, it is submitted that protection must also exist for the right to publish and distribute the same materials. The publisher, printer and distributor must of necessity enjoy the same rights as those who receive and purchase material for their private use, since publisher, printer and distributor stand as surrogates for the rights of those who seek to possess the material. See, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, fn. 6. In *Griswold v. Connecticut*, 381 U.S. 479, the Executive Director and Medical Director of the Planned Parenthood League were held to have standing to raise the constitutional rights of married persons, because otherwise "the rights of husband and wife, pressed here, are likely to be diluted or adversely affected". (381 U.S. at 481.)

In light of all of the foregoing, amici respectfully submit that the district court below correctly decided that the state obscenity statute violates the free speech and press guarantees of the First and Fourteenth Amendments.[2] *Stanley* is not essentially new doctrine; it is a logical development of the constitutional standards for judging obscenity. The trend of these developing standards has been away from restriction upon expression insofar as adults are concerned, with emphasis solely upon dissemination of material to minors or those persons unwilling to receive such material. "In this manner, 'public distribution' may be defined narrowly to denote those forms of distribution or display which thrust obscenity on unwilling individuals."

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[2]The Texas statute was held unconstitutionally overbroad, in the light of *Stanley v. Georgia*, by the Honorable Temple Driver, a Judge of the 89th District of Wichita County, Texas. The Findings of Fact and Conclusions of Law were filed on February 9, 1970, and are attached hereto as Appendix B.

Note, "The Supreme Court, 1968 Term", in 83 *Harvard L.R.* at 152. The right to receive obscene material is an attribute of privacy, a right protected by the Constitution. The right to distribute the material sustains the right to receive. The State's sole interest is in preventing forceable and unwanted intrusion into that privacy. The decision in *Stanley* gives assurance that expression will remain "uninhibited, robust and wide-open". *New York Times Co. v. Sullivan*, 376 U.S. 254, 270.

B. The issue of adult freedom of access to expression dealing candidly with sex and nudity should also be viewed, it is submitted, in light of the trend toward the abolition of criminal sanctions against all sexual practices not involving force, adult corruption of minors, or public affront. It has been urged, in the light of changing social and cultural standards dealing with sex, that no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. American Law Institute, Model Penal Code, Tentative Draft No. 4 (1955), pp. 276-291. The premise underlying this position is that it is not a proper function of the criminal law to regulate private morality. Israel, "The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code", in 14 *Wayne L.R.* 772, 948-957 (1968). See also, Ill. Ann. Stat. ch. 38, §§11-1 to 11-20 (Smith-Hurd 1964); Note, "The Proposed Law of New York", 64 Colum. L.Rev. 1469, 1545 (1964).

The changing attitudes with respect to private consensual sexual conduct is also reflected in decisions of the courts. Cases emphasize that the right to privacy is

no less important than any other right safeguarded by the Constitution. The First Amendment, "has a penumbra where privacy is protected from governmental intrusion". *Griswold v. Connecticut*, 381 U.S. 479, 483. The courts have rejected the notion that the enforcement of morality without demonstrable individual harm, at the expense of liberty, is worth the price. It has been suggested that punitive measures under such circumstances may constitute cruel and unusual punishment, in violation of the prohibitions of the Eighth Amendment. An evaluation of the considerations which have led in the past to the prohibition of such private conduct has led to the conclusion by many courts that the prohibitions do not merit retention. See, *People v. Belous*, 71 A.C. 996, 458 P.2d 194, 80 Cal.Rptr. 354 (1969) (California abortion statute held invalid—"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 80 Cal.Rptr. at 359); *Morrison v. State Board of Education*, 1 C.3d 214, 461 P.2d 375, 82 Cal.Rptr. 175 (1969) (Private homosexual relations between teachers not subject to disciplinary action in absence of evidence that teacher's conduct indicated unfitness to teach); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (Alleged homosexual advance by protected Civil Service employee toward another was not sufficient to justify dismissal); *Cotner v. Henry*, 394 F.2d 873 (7 Cir., 1968) (Federal habeas corpus—Conviction under Indiana sodomy statute—Substantial question raised as to whether acts performed by married people with mutual consent could constitutionally be prohibited

by the State—"The import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty." 394 F.2d at 875).

"In view of the aforesaid considerations, it is plain that the adult community should today at least be entitled to enjoy the fullest exercise of freedom of expression in the areas of sex and nudity. Whether material be deemed obscene or not, adults have the right to read, view and discuss for their personal edification, all ideas, including those dealing with sex. They have the right to be entertained and amused as well as to be informed, if the safeguards of freedoms of speech and press under the First Amendment are to be maintained. Individual autonomy in the area of sex is as essential to the welfare of the nation as in any other area of human concern.[4]

C. The decision in *Stanley v. Georgia*, holding that the private possession of obscene material may not be made criminally punishable under the Constitution, im-

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[4]Dr. Milton H. Miller, professor and chairman, Department of Psychiatry, Wisconsin Medical School, Madison, Wisconsin, when queried whether pornography was a threat to society or just a nuisance, replied:

"Pornography is a threat to society. Any fool knows that . . . At the present time pornography remains a threat to society, though it is 14th in line and it follows in seriousness (1) the threat of a nuclear war that would end civilization, (2) the Vietnam War, (3) general inflation, (4) death on the highway, (5) riots in the cities, (6) civil rights abuse, (7) persisting poverty, (8) crime in the streets, (9) air and water pollution, (10) abuse of natural resources (lakes, streams, and forests), (11) overpopulation, (12) billboard desecration of our highways, and (13) falling farm prices.

"Undoubtedly, pornography will remain a threat to society, but its seriousness will probably drop in the next ten years from 14th to 35th place." Quoted in *Censorship Today*, Vol. 1 No. 2, p. 29.

plicates issues of equal protection of the laws. In *United States v. Thirty-Seven (37) Photographs*, (D.C. Cal. 1970) Civ. No. 69-2242-F,[5] a three-judge district court held that 19 U.S.C. 1305 was unconstitutionally overbroad in the light of the ruling in *Stanley*. Among other things, the court stated, "The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent". A similar view was expressed by Circuit Judge Aldrich, writing for a majority of a three-judge court in *Karalexis v. Byrne*, (D.C. Mass. 1969) Civ. No. 69-665-J, appeal pending. Judge Aldrich stated, "If a rich Stanley can view a film, or read a book, in his home, a poor Stanley should be free to visit a protected theater or library. We see no reason for saying he must go alone".

It is axiomatic that in our constitutional system, rich and poor stand in equal relation under the law. Invidious discriminations between groups of affluent and poor persons are forbidden under the Constitution. See, *Griffin v. Illinois*, 351 U.S. 12. One who has the means may purchase books and magazines for home use; he may, if he so desires, view films in the privacy of his home or arrange for profesional entertainment therein. A person with lesser means will turn to the public libraries, the motion picture houses, or the theater for his entertainment and information. Clearly, there is no practical reason or constitutional justification for discriminating between such groups of citizens.

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[5] A copy of the opinion is attached as Appendix A to the Motion to Affirm in *Blount v. Rizzi*, October Term 1969, No. 788, pending in this Court.

The constitutional admonition that no State shall deny any person the equal protection of the laws stands as a barrier, it is submitted, against such distinctions.

D. Problems dealing with sex and nudity are human problems, and therefore have universal significance. For these reasons, amici deem it appropriate to bring to the attention of the Court the experience of Denmark, which has removed all legal prohibitions against the publication, sale and distribution of alleged obscene materials to adults. The sale of obscene material to a person under sixteen years of age is punishable by fine. Denmark also provides that it is illegal to obtrusively intrude upon people obscene materials they do not want to see. Subject to these two qualifications, all material dealing with sex and nudity may be read or viewed by Danish citizens.

As the report of the Ministry of Justice indicates (Appendix A), Denmark began consideration of the legalization of obscenity some time in 1964, when a permanent criminal law committee was requested to consider the need for a change in the existing statutes. The specific incident which triggered this re-examination of the obscenity statutes was the prosecution, and subsequent acquittal in 1964, of the Danish publisher of *Fanny Hill*. See, Buckley, "Oh! Copenhagen!", in New York Time Magazine, February 8, 1970, pp. 32, 34. The committee reported that under prior practice very few books had been found punishable and prosecutors and judges had found the task of defining the limitations of the law in individual cases to be almost a hopeless one. No one ever succeeded in stating a general definition of pornography on the basis of which the law might be interpreted. In addition, the evidence was lack-

ing in support of any assumption of harmful effects resulting from the reading of descriptions of sexual activity, even in its more extreme forms. The committee expressed the view that the obscenity laws ought not to be maintained merely on the basis of a moral evaluation of the books in question. The only consideration, insofar as the committee was concerned, was the question of preventing actual harm to individuals. Believing, however, that a distinction might be made between books and pictures, the committee recommended that the obscenity laws be repealed insofar as adults were concerned, with respect to written material only. Parliament adopted this recommendation in 1967.

Following the passage of the 1967 laws, there was a considerable decrease in the number of obscene books. On the other hand, obscene pictorial magazines—still illegal—increased in number. Considering the good experiences resulting from the 1967 amended statutes and the difficulties of enforcement, the Minister of Justice decided to introduce a measure to also make legal obscene pictures and objects. A parliamentary committee made extensive investigation and concluded that all restrictions on pornography be removed, except for sale to children under sixteen and to blatant intrusion upon privacy. The new law became effective on July 1, 1969.

In 1967, the year in which printed pornography was legalized, the number of alleged sex offenses reported to the police in Copenhagen dropped 25% from the preceding year. There was another 10% drop in 1968. Despite the legalization of all pornography, in the last six months of 1969 the figures declined even more dramatically for the year, down by 31%. See, *Buckley, supra*, p. 36.

The Danish experiment, it is submitted, has particular relevance here. To a large extent, the problems of that western nation were precisely the same as those which exist in this county, and the arguments for censorship followed the same pattern as those which have been made in the United States. The issues were resolved in Denmark because Denmark, like the United States, was vitally concerned with upholding freedom of expression. The Danish people recognized that the maintenance of adult censorship was justifiable only if required by weighty social reasons. None of the reasons advanced for such censorship, either as a practical matter of for other social or political reasons, was found acceptable. Indeed, all of the evidence indicates that the abolition of obscenity laws affecting adults has had an opposite effect from the effect predicted by the advocates of censorship. This appears to be the consensus of Denmark's psychiatrists, sociologists, teachers, and even clergymen and police officials.

Conclusion.

Amici respectfully submit that the decision and judgment of the district court was correct and should be affirmed. The Constitution of the United States, it is submitted, stands as a bar against any limitation upon the right of adults to read or view material dealing with sex or nudity for their own private use. The State's concern is properly limited to dissemination of material intended for minors or material disseminated in such a manner as to be obtrusively forced upon unwilling persons.

Respectfully submitted.

STANLEY FLEISHMAN,
MEL S. FRIEDMAN,
Amici Curiae.

APPENDIX A.

Report on Danish Criminal Code Amendments and Rules on Film Censorship Issued by Ministry of Justice, Copenhagen.

20, August 1969.
L.A. 1968. 20002.25.

Recent Danish Criminal Code Amendments Concetning Pornography.

1. The text of the *sect. 234* of the Criminal Code was *until 1967*:

"(1) Any person who

(i) offers or hands over to any person under eighteen years of age obscene publications, pictures or objects; or who

(ii) publishes or circulates or, for such purpose, produces or imports obscene publications, pictures or objects; or who

(iii) arranges for any public lecture, performance or exhibition of an obscene nature;

shall be liable to a fine or to lenient imprisonment ("haefte") or, in aggravating circumstances, to imprisonment for any term not exceeding six months.

(2) If any of the acts mentioned in subsect. (1) of this section is committed for commercial purposes, a fine may be imposed only in particularly extenuating circumstances.

(3) Any person who, for the purpose of gain, publishes or circulates or, for such purpose, produces or imports publications or pictures which, without being actually obscene, must be assumed

to be solely intended for a commercial exploitation of sensuality shall be liable to a fine or to simple detention for any term not exceeding one year".

2. In December 1964 the Danish Minister of Justice asked the *Permanent Criminal Law Committee* to consider the need of a change in the Criminal Code Section 234 on pornography. The Committee submitted its report in June 1966, and the report was published under the title: "(Betænkning No. 435, 1966) Strafferetsrådets betænkning om straf for pornografi."

Three members of the Committee recommended that the criminal offence of producing, publishing or circulating obscene books, magazines etc. should be removed from the Criminal Code, whereas one member was in favour of retaining a criminal law prohibition in this field. All four members agreed that it was not advisable to give obscene pictures entirely free at the same time.

The Criminal Law Committee found the question a difficult one to solve, and the report gives rather a detailed statement of the arguments. There were perhaps two main arguments for the change which was proposed.

First, it was a fact that under court practice since the 1950's the previous law had already been interpreted so liberally that very few books (and no books of some literary merit) were found punishable. Thus, by maintaining the prohibition against obscene literature it would in any case be impossible to reach more than a very limited part of the total production of dirty books.

For prosecutors and judges the task of defining the limits of the law in individual cases was an almost hopeless one. No one has ever succeeded in stating a general definition of pornography on the basis of which the law might be interpreted.

Secondly, practically all the evidence brought forward by criminologists, psychiatrists, psychologists, sociologists etc. was to the effect that there was no reason to assume more than a remote risk of harmful effects—even on young persons—from the reading of descriptions of sexual activity, even in its more extreme forms. On the other hand it was admitted by the experts that there was relatively scarce evidence that harmful effects could *not* occur. Apparently the actual situation is that very little systematical research has been carried out, so that conclusions have to be based on the more general clinical experience of psychiatrists and psychologists. On that basis the experts expressed the negative conclusion mentioned above. In the course of later public and political discussions people in favour of a statutory prohibition had no possibility of referring to expert opinions.

It was the declared standpoint of the Committee, that the previous rule ought not to be maintained merely on the basis of a moral evaluation of the books in question. The justification of the rule ought as far as possible to be found in considerations of practical usefulness, particularly the question of preventing a risk of harm being done to individuals.

The question of making a distinction between books and pictures caused much discussion. However, the Committee found it advisable to make this distinction, partly because pictures may have a tendency to produce more direct psychological effects, as compared with books, where the reader will normally have good opportunities to stop reading when he finds that he does not like the book.

3. The *Minister of Justice*, acting upon the advice of the Committee, introduced a Bill to amend sect. 234, which was enacted by Parliament in June 1967. The new version of the provision was the following:

> "Any person who
>
> (i) offers or hands over to any person under eighteen years of age obscene pictures or objects; or who
>
> (ii) publishes or circulates or, for such purpose, produces or imports obscene pictures or objects; or who
>
> (iii) arranges for any public lecture, performance or exhibition of an obscene nature;
>
> shall be liable to a fine or to lenient imprisonment ("haefte") or, in aggravating circumstances, to imprisonment for any term not exceeding six months."

The chief amendments came into force on the 16th August 1968. This was bound up with the denunciation by Denmark of the Convention relating to the Suppression of the Circulation of and Trade in Obscene Publications concluded at Geneva on 12th September 1923.

4. According i.a. to the evidence given by the Danish Publishers' Association, the period after the 1967 amendment saw a considerable decrease of the number of obscene books. This confirmed the hopes of the legislators that the liberalization would "dedramatize" the situation as to this literature, the attention of the public being no longer attracted thereto by the machinery of justice. On the other hand, the number of obscene pictorial magazines—still illegal—was considerably increasing, giving rise to evident difficulties in the enforcement of the penal provision. Because of the quantities, the police were unable to control all publications, and it was often not possible to enforce seizures, eventually decided upon, until large parts of the stocks had already been sold. Furthermore, because of the rather rough criteria which had to be adapted for practical reasons, a great number of erotical pictures were not prosecuted, so that it might seem arbitrary, in relation to the intended protection of public decency, to prosecute just the others. Should it be decided to strengthen the efforts to enforce the provision of pornography, other fields—maybe of a more evident social importance—would be weakened correspondingly.

Taking into consideration the good experience of the 1967 amendment and the difficulties of enforcement mentioned above, the Minister of Justice decided to introduce a Bill to make legal also obscene pictures and objects. In his introductory speech in Parlament he also emphasized the considerations for the personal freedom:

"Even if a liberalization can be hoped to decrease the interest in these pictures etc., of course you have to face the fact that there will still be some persons interested to buy them. It is, however, a question whether this is a sufficient argument against the liberalization. In my view, by leaving the decision to the individual, you will strengthen the development, which can be observed in so many fields in these years, towards a greater freedom for the individual citizen to plan his own life and towards the greater personal responsibility following from that."

However, the Minister found that there would be good reason to retain a protection of young persons, but found it natural to lower the age to 16 years to conform with the young persons under the Film Censorship Act, amended at the same time.

Parliament enacted the Bill by 112 votes for, 25 against and 4 abstentions.

5. The text of sect. 234 as amended is as follows:

"Any person who sells obscene pictures or objects to a person under 16 years of age shall be liable to a fine."

The provision came into force on 1st July 1969.

6. The amendment mentioned does not imply that it is legal to intrude upon people obscene materials they do not want to see. On the contrary, during the preparatory works of the new legislation, much attention has been devoted to the protection against such intrusion.

a. Already, according to sect. 232 of the Criminal Code,

> "any person who by obscene behaviour violates public decency or gives public offence shall be liable to imprisonment for any term not exceeding 4 years or, in extenuating circumstances, to lenient imprisonment ("haefte") or a fine."

b. In connection with the Criminal Code amendment the *Police Byelaws* have been amended in order to prevent i.a. exhibitions or distributions of offensive publications or pictures in public streets or places. It is understood that the word "offensive" is more comprehensive than the word "obscene".

The Byelaws also prohibit the delivering in houses of offensive publications or pictures to other inhabitants than those who have, *expressis verbis*, ordered such things.

7. According to the *Postal Act*, it is a criminal offence to post to foreign countries objects excluded by the Universal Postal Convention, i.a. objects the import or distribution of which is prohibited in the country of destination, and obscene or immoral objects. It is not a criminal offence to export obscene material by other means; however, foreign customs authorities have far better possibilities to detect the character of the goods in these cases than in the case of mailed goods.

Annex.

Sex Crimes in Denmark 1963-68.

According to the Annual Report of the Police for the year of 1968—recently published—the total number of sex crimes coming to the knowledge of the police was in

1963	4.364
1964	3.968
1965	4.316
1966	4.210
1967	3.275*
1968	3.060

Except for 1968 these figures can be broken down to show the trends of the most important categories of sexual offences:

	1963	1964	1965	1966	1967
Rape etc.	173	259	162	215	203
Other heterosexual offences.	3325	2940	3386	3080	2458
of these against children under 15 years	1583	1421	1534	1297	909
Homosexual offences	432	364	281	593	233*
of these against children under 15 years	304	204	210	491	171

*The provision criminalizing receiving payment for committing sexual immorality with a person of the same sex was repealed as from the 1st July 1967.

The Danish Rules on Film Censorship.

1. The question of the maintenance of film censorship had been in the focus of the public debate for some time when in July 1963 the Minister of Justice appointed a Committee to consider whether to change the rules in force.

2. The Committee submitted their Report in December 1967. A summary of the report, including also a survey of the legislative development in this field, is enclosed.

3. The Minister acted upon the advice of the Committee, introducing a Film Censorship Bill in accordance with the draft included in the Report.

4. The Bill was enacted by Parliament (Act No. 135 of 29th March 1969) and entered into force on the 1st July 1969.

5. The new Act does not apply to films entering the State *television* programme, to which special supervision rules apply. A cooperation between the television authorities and the Film Censorship Board has, however been foreseen.

Summary of the report submitted by the film censorship committee.

1. The Committee, which was composed of nine members with Professor Thomas Sigsgaard in the chair, was appointed by the Minister of Justice on July 4th. 1963. The Committee was charged with considering whether the existing arrangements relating to film censorship should be changed and, if so, to make recommendations on the subject. As a basis for its recommendations the Committee should examine the investi-

gations that has been made of the impact of the cinema on its audience, more particularly on children and young people, as well as the most important foreign systems of censorship.

The Danish Committee has co-operated closely with the Film Censorship Committee that was appointed in Sweden in October 1964. Like the Danish one, the Swedish Committee is charged with considering the question of changing the existing arrangements in regard to censorship.

The Committee's examination of the existing research dealing with the impact of the cinema on its audience was based on an account of this research that is included in Annex 1. The account was prepared, at the request of the Committee, by Gerhard Nielsen, Ph.D., lecturer at the University of Copenhagen.

In addition, the Committee to a large extent has relied upon the research that in recent years, in close contact with the Swedish Film Censorship Committee has been carried out in Sweden under the guidance of the Swedish Film Institute (Svenska Filminstitutet). A summary of the findings of these research projects is given in a Report submitted by the Swedish Film Institute entitled: The Impact of the Cinema on its Audience (Filmens inflytande pa sin publik), which was published in June 1967 as part of the Reports of the Swedish Committee.

The Committee has further taken into account the information contained in the Report of the Danish Criminal Law Council on the punishment of pornography (Report No. 435/1966).

Finally, the Committee has acquainted itself with part of the material of the Sub-committee of the Euro-

pean Committee on Crime Problems that has been concerned with the relationship between the mass media of communication and juvenile delinquency.

2. Denmark has had special film censorship since 1913. The existing provisions on censorship are found in section 20-23 of the Cinema Act, No. 117, of April 13th 1938, as amended by the Act, No. 133, of March 31st 1960. These provisions provide for films to be approved by the State Censorship Board before being shown in public. The Board is not allowed to approve films liable to offend public decency or to have a brutalising or otherwise demoralising effect.

Films that are deemed likely to have a harmful effect upon children's minds or their conception of justice can not be approved for showing to children. Until 1960, there was only one age level in the case of films to which children were not admitted, namely 16. The 1960 Act provided for another age level of 12. The film censors may now ban the exhibition of a film to children under 16 or under 12 years of age.

The censorship is exercised by film censors appointed by the Minister of Justice. The Cinema Act does not provide for the number of censors, nor for their qualifications. The Board today is composed of three regular censors and one substitute member. One of the censors, normally an official of the Ministry of Justice, acts as the administrative head of the Censorship Board.

An appeal may be made from the decisions of the Board to the Minister of Justice.

3. A survey of the *practices of the Censorship Board* is included as Annex 3 of the Report. It shows that the decisions of the Board on feature films from April

1st 1960 (after the introduction of the 12-year level) to March 31st 1967 are made up as follows:

Approved for all audiences	about 28	per	cent	
Children under age 12 not admitted	–	15	–	–
Children under age 16 not admitted	–	52	–	–
Totally banned	–	1	–	–
Provisional decisions	–	4	–	–

4. The prime question before the Committee was whether the power to *ban films for showing to adults should be maintained.*

The Committee based its consideration of that problem on the view that regard for freedom of expression militates against any form of censorship and that the maintenance of adult censorship, then, is justifiable only if required by weighty social reasons. In this context the Committee points out, that today films are the only means of expression that is subject to a system of state censorship in Denmark.

In evaluating the question of censorship, account should, in the opinion of the Committee, be taken also of the radical changes in the economic, social and cultural structure of society that have taken place in the course of the last few decennia. As result of this development, large groups of the population today get into contact with the outside world to a far greater extent than formerly and thus become acquainted with events and conditions outside their own environment. In this connection, the rapid expansion of television and other mass media of communication has played an important role. Owing to the growth of television, in particular, the

cinema does not occupy the same position of prominence as before among the mass media of communication.

As a result of this trend, the principal consideration underlying adult censorship, namely the wish to protect the population against undesirable influences likely to emanate from films, no longer carries the same weight. In this context, it is pointed out that the cinema as a factor of influence cannot be isolated from the numerous other factors affecting the individuals, and that there is no scientific proof of the frequently made assertion that the cinema has a different and stronger impact than other factors.

The problem of censorship should also be viewed in light of the trend that has made itself felt in Denmark in recent years towards abolition or modification of measures that restrict the free scope of the citizens. The most recent example of that tendency of liberalisation is the abolition of the provision of section 234 (on pornography) of the Criminal Code, as far as printed material is concerned.

The Report points out that a system of state censorship cannot be justified by the desirability of controlling the films purely on moral or aesthetic principles. The Committee considers it unacceptable in principle that the exhibition of a film should depend on whether a state agency approves the film with reference to specified ethical and aesthetic criteria. To this must be added that it would hardly be possible to lay down any reasonably objective standards governing the exercise of censorship based on such criteria. Hence, there would be a risk that the decisions of the censors were made on the basis of their personal views as to what should be regarded as morally objectionable or artistically inferior.

Nor can the maintenance of censorship, in the opinion of the Committee, be justified by referring to the fact that production of films largely take place with the primary aim of making a maximum profit, and not from the wish of producing artistically valuable films. Commercial speculation in the supposed wishes and needs of the public takes place in many other fields where there is no question of any similar regulating measures. Obvious examples are pulps, serial magazines and certain weeklies.

For the Committee the crucial point has been whether the showing of certain types of films is likely to bring *more serious harm* to an adult audience. If it is not possible to show, or at least render probable, the existence of such harmful effects, it is difficult to justify the maintenance of adult censorship.

5. The Committee has made an evaluation of possible harmful effects on the basis of the rules in force (see above under paragraph 2).

(a) As regards the power to ban films from showing to adults by reason of *depictions of sexual relations* (*"violation of public decency"*), the Committee considers that there is not sufficient justification for maintaining that ground for prohibition. According to the existing scientific evidence, there is no basis for assuming that depiction of sexual relations should have any harmful effects. Moreover, the difficulties of separating the judgment of the harmful effects of a film from evaluations based on moral criteria make themselves particularly felt in this field.

(b) The Committee was more doubtful as to whether the provision for banning films of *such a nature that*

their exhibition would tend to have a brutalising effect should be maintained. The existing investigations seem to indicate that a large-scale viewing of films which contain scenes of violence and glorify the use of violence may tend to enhance an already established anti-social attitude, which in the long run may result in acts of violence. As it is not primarily a question of the possibility of releasing isolated acts of aggression, but of long-term influences on general attitudes, it would be difficult to provide any clear scientific evidence of such influences.

A judgment of the possibility of objectionable influences of films of violence should take into account that, as already mentioned, the production of films is largely determined by purely commercial considerations. This being the case, the production of films of violence is likely to continue as long as such films attract a sufficiently large audience. Further, if censorship is abolished, one must face the risk of a number of films being imported or produced which up till now have been kept back by producers and distributors, who expected them to be banned. The best protection against a decline in the standard of the repertory of the cinemas would be the reaction of the audience and public opinion, which reflected notably through the press and other mass media. The Committee considers that great importance should be attached to the influence on the repertory that may be exercised in that way. As the appreciation of the art of the film is developed, among other things through increased education, there is reason to believe that a positive influence may emanate from the audience and the press.

In considering whether the risk of harmful influences is sufficient to justify the maintenance of adult censorship, it should be kept in mind that the number of films that are totally banned or in which cuts are made as a condition of approval for showing to adults is very small. At present a large and probably increasing number of films containing scenes of violence is being shown. As regards certain war films, in particular, it can be recognised that censorship has been no very active barrier. A really effective contribution on the part of the Film Censorship Board to obviate the risk of a brutalising influence would require the taking of a much harder line than before in the rating of films of that category. Even if adult censorship was maintained, the Committee would consider it unrealistic to count on the feasibility of so tightening the practice of the Board. Nor does the Committee consider it reasonable that, from the wish of eliminating or reducing the risk of objectionable influences on a minor section of the audience, a change of practice should be made that would inevitably affect also a number of serious realistic films.

Conversely, the abolition of censorship, even allowing for any preventive effect, will hardly in the long term imply any decisive change in the cinema repertory.

Besides in the opinion of the Committee considerable importance should be attached to the above mentioned fact, that the population today to a much greater extent than before is exposed to influences from other sources, notably from the other mass media of communication.

In the light of this, the Committee sees no reason to assume that the abolition of censorship in regard to films would imply any substantially increased risk that

the adult population would be exposed to harmful influences in the way of brutalisation or "dehumanisation". The Committee therefore considers that there is not sufficient justification for maintaining the provision for banning films for that reason.

(c) As already mentioned, the third ground for disapproval provided for in the Cinema Act is to the effect that films must not be approved if they are *deemed likely to have a (brutalising) or otherwise demoralising effect*. The application of that ground presupposes that the Censorship Board will make a decision that is not primarily based on an estimation of the possible harmful efects of the film, but on moral or ethical principles. As the Committee finds it unacceptable in principle that a state censorship agency should be able to ban films on the basis of such an evaluation, the Committee cannot recommend maintenance of the provision for banning films by reason of their supposed demoralising effect.

(d) In the light of the available evidence, there is no reason to believe that there should be any *other effects that may be characterised as harmful to a normal adult audience*. In this context, the Committee leaves out of account the possible influence of certain films on the audience's concept of reality, such as films giving a distorted, "rosy" picture of life. Large-scale viewing of such film may contribute to the reduction of the ability of the audience to form a realistic picture of the surrounding world. Whether or not such an effect is considered harmful, there can be no question, according to the Committee, of any censorship on that basis.

6. In the light of what is stated under paragraph 5, the Committee has reached the conclusion that there are

no sufficiently weighty reasons for maintaining the power of any state authority to ban films from showing to adults. The Committee has considered whether private censorship is likely to be established in the case of the abolition of state censorship. It is probably not precluded that the film industry will try to obviate the risk of violating the pornography provision of the Criminal Code through the establishment of a sort of censorship on a voluntary basis; on the other hand, private censorship like that is unlikely to be effective. This also applies to censorship exercised by private groups or societies with a view to influencing the cinema repertory.

7. One member of the Committee, who represents the cinema owners, has not been able to endorse the proposal for abolishing adult censorship. The member concerned argues that the abolition of adult censorship in his opinion will result in the Danish film market being flooded with horror films and films of violence. The release of such inferior films will substantially lower the standard of the cinema repertory, which will be a disservice to cinema-owners and decent audiences alike.

8. The Committee was in agreement that the provision for *banning films from showing to children should be maintained.*

(a) First of all, the Committee points out that according to the available evidence about the influence of the cinema on its audience there is reason to believe that in certain circumstances films may have a harmful impact upon the minds of children.

Moreover, there is reason to believe that, unlike what is the case for adults, at least under the present practice, such harmful effects may to some degree be obviated

through censorship. In this connection, the Committee has taken into consideration that, today at least, the possibilities of counteracting the objectionable effects of the cinema through constructive measures, such as film education, are inadequate.

Finally, the Committee has stressed that the considerations that may be advanced against adult censorship, first of all regard for freedom of expression, do not make themselves equally felt in the case of regulating measures in relation to children, who, on the one hand, have a right to protection on the part of society and, on the other, have little opportunity of taking part in the creation of public opinion.

(b) As regards the *risk of harmful influences*, the Committee places the chief emphasis on the possibility stated above in paragraph 5(b) that the cinema may have a *brutalising effect*. That risk is likely to be greater in case of children than of adults.

In this context, the Committee has discussed the relationship between the cinema and juvenile delinquency. On the strength of the existing evidence there is no basis for assuming that juvenile delinquency can be directly traced to film viewing. Rather, there is reason to believe that any large-scale viewing of films of violence is a symptom of more deep-rooted psychic difficulties that may lead to juvenile delinquency. However, the Committee will not exclude the possibility that the generally brutalising effect of excessive film attendance, combined with other factors, may have a certain significance in relation to criminality.

The other main category of films which in the opinion of the Committee may have harmful effects consists

of film *with a content that might frighten or provoke anxiety in children.* This effect could be harmful in particular to the younger child.

In addition, the Committee recommends that the film censors should be empowered to prevent a film from being shown to children if it contains *sexual depictions which the censors consider harmful to children in the age groups provided for.*

Finally, the Committee recommends that there should be a provision for banning films from showing to children by reason of descriptions *clearly inciting to discrimination of persons belonging to a particular race or creed.*

As to the drafting of the legal provision on child censorship, the Committee would find it most appropriate not to make any detailed indication in the legal text of what harmful effects may be envisaged, partly because such an indication cannot be in any way complete, partly because the Censorship Board should be given a reasonable opportunity to change its practice in accordance with changes in the attitudes of experts. Hence, the Committee has chosen a draft according to which the Censorship Board shall make its decision *on the basis of a judgment as to whether the film is likely to be harmful to children.*

9. Notwithstanding the fact that the existing scientific evidence seems to show that the personality of the individual is a more significant factor than is biological age, as regards the harmful influence of a particular film, the Committe considers that child censorship can only be based on specified age levels. As for the age levels the Report states that the research in this field

seems to provide a certain support for fixing an age level at 12. On the other hand, the findings do not seem to call for another and higher age level. The Committee was agreed, however, that there should continue to be provisions for banning films from showing to children over the age of 12, and that the system introduced in 1960, providing for two age levels, should therefore be maintained. In this connection, the Committee has taken account of the fact that the existing research material is too limited to permit any definite conclusions as to the need of an age level higher than 12. The Committee considers that general experience confirms that there is a substantial difference in susceptibility between 10 to 11-year olds and 14 to 15-year olds. In the opinion of the Committee, protection of children in the latter age group is needed primarily because of the harmful influence that may emanate from films of violence. Such films are liable to exercise an influence that in the long run may result in the "dehumanisation" of the attitudes of children. The fact that an influence of that nature has not been established scientifically cannot be decisive considering the extremely great difficulties involved in carrying out research in this field. As matters now stand, it would not be advisable to abolish the provision for banning films from showing to children of 12 or over.

The available scientific evidence does not provide any certain basis for determining the second age level. In the absence of such evidence the Committee recommends maintenance of the present age level of 16. Accordingly, the Committee recommends that *the present age levels of 16 and 12 be maintained.*

The Committee has also considered whether the abolition of adult censorship may justify that the 12 and 16-year levels be supplemented by a provision for banning films from showing to youngsters under 18 in special cases. The 18-year level should mainly be applied to films which according to the present practice of the Film Censorship Board would be totally banned or in which considerable cuts would be made as a condition for approving the film for showing to adults. The recommendation of the Committee to maintain child censorship is, as mentioned previously, chiefly due to the fact that children are more susceptible to influence by films than are adults. Some members of the Committee are of the opinion that the susceptibility, though decreasing as the young person approaches adult age, still at the ages of 16 to 18 is so great that in fact there might be a case for raising the age level to 18 in the case of films deemed likely to have a particularly brutalising effect. In this connection it should be kept in mind that the impossibility of fully ensuring the observance of the age levels, makes it likely that a number of 14 or 15-year olds will see films that are banned from showing to children under 16. Owing to the difficulties of effectively enforcing the age levels, however, the advantage of having two age levels so close to each other as 16 and 18 is doubtful. It would even be possible that the main effect of fixing the age level in special cases at 18 would be that of giving the film an unintended, but effective publicity. Also the fact that the harmful effect is likely not to be associated with the individual film, but to presuppose that the child or youngster sees a large number of films of a particular category, makes it doubtful whether there is sufficient

reason for legalising an age level that is designed to apply only in exceptional cases. For these reasons the Committee has chosen to refrain from recommending that the present age levels be supplemented by an 18-year level.

10. As far as the *organisation of the censorship* is concerned, the Committee recommends that the Board should be composed of persons who by virtue of their education possess the necessary qualifications for making an expert judgment of the suitability of a film for showing to children in the legally established age groups. As a result, the censors should be persons with an educational or physchological training.

Further, the Committee recommends that the censors be appointed for four-years terms and that re-appointment may take place if the person concerned is under the age of 60.

11. As regards *appeal against the decisions of the Film Censorship Board*, such appeal may under the present arrangements be made to the Minister of Justice. The Committee recommends a change in that arrangement so that an appeal would be made to a special board of appeal.

Having regard to the nature of the decision to be made, the Committee proposes that the board of appeal should include educational and psychological experts. The fact that the task of the board is to review decisions made by experts might indicate that all or in any case the majority of the members of the board of appeal should be in possession of the same expert knowledge as the censors. The Committee considers, however, that it would be more appropriate for the final de-

cision to be made by a somewhat broader forum, the view being that decisions made solely by experts are liable to be marked by attitudes which according to generally accepted notions are one-sided. In determining whether a film should be approved, it would seem reasonable that more general social views and judgments might also be heard.

The Committee recommends, then, that the Board of Appeal be composed of five members, one of whom should be a legal expert, two being trained educators and/or psychologists, and two being chosen among persons who have shown interest in film and are familiar with child and youth problems. The Committee would prefer that none of the members be appointed as representatives of organised groups.

The Committee also recommends that, as regards term of office and age limits, the same rules should apply to the Board of Appeal as to the Film Censorship Board.

APPENDIX B.

Findings of Fact and Conclusions of Law, Hon. Temple Driver, Judge of District Court, Wichita County, Texas.

Filed for Record at 3:52 o'clock P.M. Feb. 9, 1970.

State of Texas vs. Steve Scott and Cinne Arts Theatre, Inc. No. 87,174-C.

In the 89th District Court of Wichita County, Texas.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I.

This lawsuit was originally initiated and brought by The State of Texas through the County Attorney's Office of Wichita County, Texas, in the above-styled and numbered cause, pursuant to Article 527, as amended, of the Penal Code of the State of Texas, seeking an injunction and destruction of alleged obscene press materials.

II.

Among numerous motions filed by Defendants, a Motion to Dismiss this Lawsuit and Motion to Declare the Texas Obscenity Statute, Article 527, Unconstitutional and Void, was filed before the hearing, the evidentiary hearing for temporary injunction. Said motion was filed on January 26, 1970, and set for hearing on oral argument for February 9, 1970, at 9:00 a.m.; and further, both parties were ordered to submit legal briefs on the constitutional questions presented in the said motions.

III.

After having considered legal briefs submitted by both parties and oral argument regarding the Motion to Dismiss this lawsuit and Motion to Declare Texas Obscenity Statute, Article 527, Unconstitutional and Void, the Court is of the opinion that the said statute is unconstitutional for the following reasons, and in the following Sections:

A. Section 3, of Article 527, as amended, is unconstitutional, in that it is over broad, and fails to differentiate between public and mere private distribution, and fails further to differentiate betwen public and mere private possession of alleged obscene materials, all in violation of the following cases, Stanley v. Georgia, 89 S. Ct. 1243; Stein v. Batchelor, 300 Fed. Sup. 602 (United States District Court for the Northern District of Texas), Dallas Division, Judges Goldberg, Circuit Judge, and Hughes and Woodward, District Judges, presiding; Karalexis v. Byrne, Civil Action 69-665-J (three judge court United District Court for District of Massachusetts); and United States of America v. 37 Photographs; United States District Court for the Central District of California (three judge court—Civil Action 69-2242-F), wherein the Federal Customs Law, 19 USC 1305 was struck down as unconstitutionally overboard.

B. Section 1-E of Article 527, as amended, of the Texas Penal Code, is unconstitutionally overbroad in that in its definition of "distribute" it also fails to differentiate between public and merg private distribution, in violation of the cases set out above.

C. Section 9 of Article 527, as amended, of the Texas Penal Code, is unconstitutional in that it specifi-

cally sets forth an ex parte search warrant provision in violation of the following cases: Marcus v. Search Warrants, 367 U.S. 718; A Quantity of Copies of Books v. Kansas, 378 U.S. 205; Fontaine v. Dial, 303 Fed. Sup. 436 (three judge court of the United States District Court for the Western District of Texas) Tyron, Inc. v. Wilkenson, 410 Fed. 2d 639; and numerous other cases, all requiring a prior-adversary-determination of the obscene nature of the press materials involved, before any search, seizure, arrest or any other criminal process can be instituted against press materials.

D. Section 1. Subsection F, of Article 527, as amended, of the Texas Penal Code is unconstitutionally vague and overbroad in setting forth the constitutionally required scienter element of knowledge by constructively imposing knowledge through a use of vague and indefinite terms so as to amount to absolute and strict liability in violation of the following cases: Smith v. California, 361 U.S. 157; New York Times Co., et al v. Sullivan, 376 U.S. 254; Noto v. U.S., 367 U.S. 290; Hartzel v. U.S., 322 U.S. 680; Baumgartner v. U.S., 322 U.S. 665; Schneiderman v. U.S., 320 U.S. 118; all holding that absolute and strict liability in the knowledge element in any prosecution seeking to restrain freedom of speech violates the constitutional protections of the First Amendment to the United States Constitution.

E. Section 13, of Article 527, as amended, of the Texas Penal Code is unconstitutional in that it fails to define proper procedural safeguards to protect freedoms of speech and press of the First Amendment to the United States Constitution when the State seeks

to restrain freedom of press by the use of the injunction remedy set out in this section of the statute, all in violation of Freedman v. Maryland, 380 U.S. 51; as more specifically applied in Grove Press, Inc. v. City of Philadelphia, 418 Fed 2d 82; in that the injunction section, Section 13, fails to set forth proper procedural guidelines in order that freedom of the press would not suffer unconstitutional suppression under this section of the statute. It fails to set forth, for example (a) the procedural guidelines for issuing temporary and permanent injunctions; (b) it fails to set forth proper guidelines as to the date and time of defendant's answer, the type of evidence to be used and produced at such a hearing, and more specifically, it fails to set forth the burden of proof before an injunction should issue restraining freedom of the press. Further, this section fails to provide for adequate notice to a defendant to be able to answer and defend allegations raised in a petition for injunction, in that it sets forth a trial setting which could be within one day after joinder of issue; this particular section fails to comply with the full scope of the "prior-adversary proceeding" which is constitutionally required by the above stated cases.

For all the above reasons stated, this Court specifically finds that those sections here-above stated are unconstitutional and violate defendant's rights under the First and Fourteenth Amendments to the United States Constitution of freedom of speech and press, and this Court hereby and herein orders, adjudges and declares the above and foregoing sections of Article 527, as amended, of the Texas Penal Code unconstitutional, void and held for naught.

IV.

The State of Texas has herein timely given notice of appeal and this Court recognizes under Rule 499 A of the Texas Rules of Civil Procedure, that such appeal would be a direct appeal to the Supreme Court of Texas; this case will be directly referred to the Texas Supreme Court for further adjudication on the constitutional questions presented herein and the judgment of this Court.

The State of Texas, by and through its law enforcement agencies here in Wichita County are permanently enjoined from any further law enforcement of Article 527, as amended, of the Texas Penal Code.

Signed and Entered this 9th day of February, 1970.

/s/ Temple Driver
Temple Driver, Judge Presiding